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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**
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12 COLLEEN STUART,

13 Plaintiff,

14 vs.

14 MICHAEL J. ASTRUE, Commissioner of
15 Social Security,

16 Defendant.

CASE NO. 10CV2385 WQH (WVG)

ORDER

16 HAYES, Judge:

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18 The matter before the Court is the Report and Recommendation (ECF No. 13) issued by
19 United States Magistrate Judge William V. Gallo, recommending that Plaintiff's Motion for
20 Summary Judgment (ECF No.10) be denied and Defendant's Cross-Motion for Summary
21 Judgment (ECF No. 11) be granted.

22 **BACKGROUND**

23 On February 27, 2007, Plaintiff filed an application for disability insurance benefits and
24 supplemental social security income. Plaintiff's application was denied initially and upon
25 reconsideration. On June 25 and August 17, 2009, hearings were held at which Plaintiff
26 appeared before an administrative law judge ("ALJ"). On September 25, 2009, the ALJ issued
27 a written decision finding that Plaintiff was not disabled. The ALJ's decision became the final
28 decision of the Commissioner of Social Security when the Appeals Council denied Plaintiff's
request for review.

1 On November 18, 2010, Plaintiff, represented by counsel, commenced this action for
2 judicial review pursuant to 42 U.S.C. § 405(g). On March 28, 2011, Plaintiff filed a Motion
3 for Summary Judgment. On April 11, 2011, Defendant filed a Cross-Motion for Summary
4 Judgment and Opposition to Plaintiff's Motion for Summary Judgment.

5 On August 3, 2011, the Magistrate Judge issued the Report and Recommendation.
6 (ECF No. 13). The Report and Recommendation recommends that Plaintiff's Motion for
7 Summary Judgment be denied and Defendant's Cross-Motion for Summary Judgment be
8 granted.

9 On September 2, 2011, Plaintiff filed Objections to the Report and Recommendation.
10 (ECF No. 14).¹ Plaintiff contends the court erred by identifying "one of the non-examining
11 doctors as an examining doctor." *Id.* at 2. Plaintiff contends that "[t]here is no examining
12 doctor in the record." *Id.* Plaintiff contends that the clear and convincing standard should have
13 been applied to the "[three] uncontroverted treating doctors' [opinions] in the record." *Id.*
14 Plaintiff contends that the court's subjective pain analysis is flawed on the grounds that
15 "[n]owhere in the record did the ALJ cite to evidence that [Plaintiff's] daily activities were
16 readily transferable to a competitive work environment." *Id.* at 3.

17 On September 3, 2011, Defendant filed a Reply (ECF No. 16). Defendant contends that
18 even if the court misidentified a non-examining doctor as an examining doctor, there is no
19 error in the court's analysis on the grounds that the ALJ did not cite the opinions of any non-
20 examining doctor as the basis for declining to give the treating physicians' opinions controlling
21 weight. *Id.* at 2. Defendant contends that Plaintiff has failed to challenge the court's findings
22 "that the ALJ properly considered the objective findings and efficacy of treatment when
23 assessing credibility." *Id.* at 3. Defendant contends that the ALJ properly relied on Plaintiff's
24 daily activities "to establish that she was exaggerating her pain and limitation." *Id.*

25 STANDARD OF REVIEW

26 The duties of the district court in connection with a report and recommendation of a
27 magistrate judge are set forth in Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b).

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¹ On September 2, 2011 Plaintiff also filed a Request to File Objections to the Court's
Report and Recommendation 2 Days Late (ECF No. 15). The Motion is GRANTED.

1 The district judge must “make a de novo determination of those portions of the report ... to
 2 which objection is made,” and “may accept, reject, or modify, in whole or in part, the findings
 3 or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b). The district court
 4 need not review de novo those portions of a Report and Recommendation to which neither
 5 party objects. *See Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005); *United States v.*
 6 *Reyna-Tapia*, 328 F.3d 1114, 1121-22 (9th Cir. 2003) (en banc).

7 A court “will disturb the denial of benefits only if the decision contains legal error or is
 8 not supported by substantial evidence.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir.
 9 2008) (quotation omitted). “Substantial evidence is more than a mere scintilla but less than a
 10 preponderance.” *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999) (citation omitted).

11 DISCUSSION

12 The Magistrate Judge correctly stated: “Although a treating physician’s opinion is
 13 generally afforded the greatest weight in the disability cases, it is not binding on an ALJ with
 14 respect to the existence of an impairment or the ultimate determination of disability.” (ECF
 15 No. 13 at 37) (citing *McLeod v. Astrue*, 640 F.3d 881, 884 (9th Cir. 2011)). The Magistrate
 16 Judge correctly stated that “[t]he ALJ may disregard the treating physician’s opinion whether
 17 or not that opinion is contradicted.” *Id.* (quoting *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th
 18 Cir. 1989)).

19 The Magistrate Judge correctly stated that “when the treating doctor’s opinion is
 20 contradicted by another physician, including an examining physician or a nonexamining
 21 physician, the Commissioner must provide ‘specific and legitimate reasons’ in the record for
 22 rejecting a treating physician’s opinion, supported by substantial evidence.” *Id.* (citing *Lester*
 23 *v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995)). The Magistrate Judge correctly found: “Since
 24 Plaintiff argues that the opinions of three of her primary treating physicians were contradicted
 25 by the opinions of ... the state agency reviewing physician[s], the ‘specific and legitimate
 26 standard’ applies here.” *Id.* at 38.

27 With regard to Plaintiff’s treating physician Dr. Hood, the Magistrate Judge correctly
 28 found that the ALJ “specifically addressed and legitimately discounted” her opinions by
 providing the following reasons:

1 (1) a lack of supporting objective evidence, (2) the inconsistencies between
2 Plaintiff's admitted daily activities and her alleged restricted abilities, (3) the
3 inconsistencies between Plaintiff's alleged ability to care for her ailing parents, and
4 her alleged restricted abilities, (4) Dr. Hood's report was merely a pre-preprinted
questionnaire with no supporting objective tests, and (5) Dr. Hood's opinion seems
to be premised on Plaintiff's subjective complaints.

5 (ECF No. 13 at 39). The Magistrate Judge correctly concluded that "[t]he reasons provided by
6 the ALJ are sufficient as substantial and legitimate reasons for discounting Dr. Hood's
7 testimony." *Id.* (citing , *Batson v. Commisioner*, 359 F.3d 1190, 1195 (9th Cir. 2004).

8 With regards to Plaintiff's treating physicians Dr. Falconio and Dr. Sebhar, the
9 Magistrate Judge correctly found that the ALJ discounted the doctors' opinions on the grounds
10 "that both doctors' assertions are too severe and are not supported by the clinical findings or
11 diagnostic studies documented by the other physicians." (ECF No. 13 at 40). The Magistrate
12 Judge correctly found that ALJ's reasons for not giving controlling weight to Dr. Falconio and
13 Dr. Sebhar's opinions including: "(1) Plaintiff's ability to care for others, (2) the weight of the
14 objective evidence in the record, including Plaintiff's physical exams, (3) Plaintiff's medical
15 treatment, (4) the effectiveness of controlling Plaintiff's symptoms with medications, and (5)
16 Plaintiff's own descriptions and testimony of her daily activities and capabilities." *Id.* The
17 Magistrate Judge correctly concluded that the ALJ provided "a detailed summary of the facts
18 and conflicting clinical evidence, and offer[ed] reasons for his conclusions[; therefore,] the
19 ALJ provided adequate specific and legitimate reasons for rejecting the opinions of the
20 Plaintiff's treating physicians." *Id.* (citation omitted).

21 The Magistrate Judge also correctly found that the ALJ relied on the "non-examining
22 witness, Dr. Weilepp" to reach his opinion. *Id.* at 40-41. The Magistrate Judge correctly found
23 that the ALJ did not rely solely on the non-examining physician's opinions to reject the
24 treating physicians' opinions. The Magistrate Judge correctly concluded that "the ALJ based
25 his rejection of the opinions of Plaintiff's treating physicians upon a review of the *entire*
26 record, including objective testing evidence, Plaintiff's subjective complaints, reports from all
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1 treating physicians, and reports from examining physicians.” *Id.* at 41.²

2 With regard to Plaintiff’s allegations of subjective pain and limitation, the Magistrate
3 Judge correctly found that the ALJ “must provide clear and convincing evidence in support of
4 his adverse [pain and limitation] credibility finding.” *Id.* at 46. The Magistrate Judge correctly
5 stated that the ALJ “found that Plaintiff’s allegations of disability were inconsistent with her
6 ability to care for others.” *Id.* The Magistrate Judge correctly found that the ALJ’s opinion was
7 based on Plaintiff’s ability to care for her father who had Alzheimer’s disease, Plaintiff’s
8 ability to care for her mother who was wheelchair bound, and Plaintiff’s ability to care for her
9 autistic son. *Id.* The Magistrate Judge also correctly found that the ALJ’s adverse credibility
10 finding was also supported by the following: “the objective evidence in the record does not
11 support Plaintiff’s limitations to the degree asserted” and “the objective evidence showed that
12 medications [that Plaintiff was prescribed] were effective, with few side-effects.” *Id.* at 47.
13 The Magistrate Judge correctly concluded the ALJ provided “sufficient, specific, clear, and
14 convincing reasons for rejecting Plaintiff’s subjective pain testimony.” *Id.* at 48.

15 After reviewing de novo those portions of the Report and Recommendation to which
16 Plaintiff objected, and after Reviewing the Report and Recommendation and the ALJ’s
17 decision in light of the Administrative Record, the Court finds the Magistrate Judge correctly
18 evaluated the facts and applied the controlling law in this case.

19 CONCLUSION

20 IT IS HEREBY ORDERED that: (1) the Report and Recommendation (ECF No. 13) is
21 ADOPTED with the exception of the word “examined” on page 40, lines 6 and 9 referring to
22 state agency consultants Dr. Lizarraras and Dr. Amado; (2) Plaintiff’s Motion for Summary
23 Judgment (ECF No. 10) is DENIED; and (3) Defendant’s Cross-Motion for Summary


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27 ² Although Plaintiff contends that the Magistrate Judge incorrectly identified non-
28 examining physicians as examining physicians, Plaintiff failed to identify which physicians
were incorrectly identified. The Court presumes that Plaintiff refers to Dr. Lizarraras and Dr.
Amado. However, as discussed above, the ALJ did not rely on the opinions of Dr. Lizarraras
and Dr. Amado in declining to give Plaintiff’s treating physicians’ opinions controlling weight.

1 Judgment (ECF No. 11) is GRANTED. Plaintiff's Request for an extension of time to file
2 Objections to the Report and Recommendation (ECF No. 15) is GRANTED.

3 DATED: November 8, 2011

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5 **WILLIAM Q. HAYES**
6 United States District Judge
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